SUPREME COURT, U. S.

IN THE
SUPREME COURT OF THE UNITED STATES
Fall Term, 1973

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No. 73-5424

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JUNIOR LEE WASHINGTON,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

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# BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## OPINION BELOW

From a verdict of guilty of rape, kidnapping, and felonious breaking and entering and consecutive sentences of death, life imprisonment, and ten years entered by the Superior Court in November of 1972, the defendant perfected a direct appeal to the North Carolina Supreme Court. That Court found no error, but the defendant was ordered re–sentenced to life imprisonment in lieu of the death penalty pursuant to the earlier decision of the North Carolina Supreme Court in *State v. Waddell*, 282 NC 431, 194 S.E. 2d 19 (January 18, 1973). The opinion of the Supreme Court of North Carolina is reported at 218 NC 175, 195 S.E. 2d 534 (1973).

## JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

## QUESTION PRESENTED

**WHETHER THE DEFENDANT'S CONSTITUTIONAL RIGHTS AS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION ARE DENIED WHEN HIS ATTORNEY WAS NOT ALLOWED TO QUESTION A PROSPECTIVE JUROR PRIOR TO IMPANELMENT AS FOLLOWS:**

**"WOULD YOUR DECISION TO IMPOSE OR NOT TO IMPOSE THE DEATH PENALTY BE INFLUENCED EITHER WAY BY EVIDENCE OF HOW OFTEN MEMBERS OF THE DEFENDANT'S RACE, IN THIS CASE THAT OF A NEGRO, HAVE BEEN CONVICTED OF RAPE AND HAVE BEEN EXECUTED, AS COMPARED TO THOSE CONVICTED AND EXECUTED IN OTHER RACIAL AND ETHNIC GROUPS?"**

## CONSTITUTIONAL PROVISION INVOLVED

### AMENDMENT XIV.

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF CASE

The petitioner was charged upon bills of indictment with rape, kidnapping, and felonious breaking and entering. On November 13, 1972, petitioner appeared in the Superior Court of Hoke County with court–appointed counsel and entered a plea of not guilty to

all three bills of indictment. The trial then started immediately. From a jury verdict of guilty as charged as to all three charges, and sentence imposed thereon, including a sentence of death, the defendant appealed to the Supreme Court of North Carolina. The Supreme Court of North Carolina found no error, but the defendant was ordered re-sentenced to life imprisonment in lieu of the death penalty pursuant to the earlier decision of the North Carolina Supreme Court in *State v. Waddell,* 282 NC 431, 194 S.E. 2d 19 (January 18, 1973). A copy of the opinion of the North Carolina Supreme Court is appended to the petitioner's Motion For Leave To File Petition for Writ of Certiorari.

## STATEMENT OF FACTS

The respondent, State of North Carolina, agrees with those facts pertinent to this petitioner's rights to be adjudicated in the Supreme Court of the United States as are set forth in that opinion of the North Carolina Supreme Court which is appended to the petitioner's Motion For Leave To File Petition For Writ of Certiorari.

## PRELIMINARY COMMENT

The respondent, State of North Carolina, would mention that the petitioner initially sought an extension of time during which he could file a Petition For a Writ of Certiorari. This petition was received by the Office of the Clerk of the Supreme Court of the United States on July 11, 1973 although the expiration of time from April 11, 1973, (date North Carolina Supreme Court opinion filed), for the filing of said Petition For Writ of Certiorari in this Court had occurred on July 10, 1973. The June 5, 1973, appointment of petitioner's counsel, therefore, allowed that attorney more than a month to petition this Court before the arrival of the July 10, 1973, expiration date. There is, also, no showing that petitioner's counsel could not have foreseen his inability to comply with this Court's rules of practice during this interim and made his request for an extension of time to file his petition before such expiration date.

## ARGUMENT

Petitioner's reasons for the granting by the United States Supreme Court of his Writ involve the following proposition:

That the trial court should not have sustained the solicitor's objection to a question directed to a prospective juror concerning a racial matter during the *voir dire* examination of such jurors. The defendant, during this examination, had proposed four questions that are quoted verbatim from page 106 of the record of the trial in the Superior Court as follows:

"1. Would you consider evidence that some others convicted of rape had been executed and some had not?

2. Would you consider evidence that there was or was not any rational basis for spearating those who died from those who were allowed to live for a conviction of the same crime?

3. Would you consider, if you had the opportunity, evidence about this defendant, either good or bad, other than that arising from the incident here?

4. Would your decision to impose or not to impose the death penalty be influenced either way by evidence of how often members of the defendant's race, in this case that of a Negro, have been convicted of rape and have been executed, as compared to those convicted and executed in other racial and ethnic groups?"

Presumably, the defendant is arguing, in support of his petition, that the refusal of the trial court to allow him to ask for a response by individual jurors to the four questions as listed above justified the granting of his writ. The Supreme Court of North Carolina noted the defendant's contentions as to the trial court's prohibition of certain of his questions of a prospective juror regarding race although such assignment of error was not brought forward in his brief. That court made these arguments in its answer to these assertions raised by the defendant:

(1) A response by a juror to the question of whether his decision to impose the death penalty would be

influenced by the number of Blacks convicted and executed for rape as compared to other racial and ethnic groups would necessarily require evidence of how often members of the defendant's race had been convicted and executed to allow such juror to draw such a comparison in his answer. Such evidence according to the North Carolina Supreme Court would have been inadmissible.

(2) The record failed to show what the prospective juror, Saunders, would have said if he were permitted to answer.

(3) When the question was propounded later to the witness, Smith, as to whether he would consider the race of the defendant as compared to the race of the prosecuting witness, the State's objection was overruled and Mr. Smith answered, "No, Sir.".

(4) All of the questions asked were directed to circumstances bearing upon "Whether the juror could or would return a verdict which would result in the *imposition of the death penalty*" (which was vacated by the North Carolina Supreme Court), and not whether his being black would affect their determination of his guilt.

(5) The North Carolina Supreme Court determined that it was not shown whether those prospective jurors that were questioned concerning the racial matter where actually among those jurors finally empaneled. Upon this basis, the North Carolina Supreme Court concluded that nothing in the *voir dire* examination could support that the jury was prejudiced racially against the defendant or that the defendant's race was a factor in their verdict.

As a related matter, it should be seen that two questions obliquely concerning the defendant's race were proposed at pages 107 and 110 of the record during the trial in the Superior Court. On these occasions, the following question was propounded separately of two of the prospective jurors: (at page 107 of the record)

"Attorney Barrington: Mr. Saunders, is one of the circumstances, if I may frame it this way, is one of the circumstances which you would consider in determining whether to give the death penalty for the crime of rape, is one of those factors the race - -
Solicitor Thompson: Objection.
Attorney Barrington: - - of the defendant as compared to the race of the prosecuting witness?
Solicitor Thompson: Objection.
Court: Sustained."
(And at page 110 of the record)
"Attorney Barrington: Would you consider among those circumstances, the race of the defendant as compared to the race of the prosecuting witness?
A. No, Sir.
Solicitor Thompson: Objection.
Court: Overruled."

The refusal by the Superior Court to initially allow this question, however, does not seem to have been raised as no exception was taken by the defendant when the question was first directed to the juror, Saunders, and the solicitor's objection was sustained, nor does the record show what this prospective juror would have answered. (Rp. 107) When the question was repeated during the examination of the juror, Smith, (at page 110 of the record), the objection of the solicitor was overruled and the prospective juror was allowed to respond in the negative.

The State would add little to the answering arguments introduced by the North Carolina Supreme Court to the questions raised by the petitioner. The petitioner has substantially reiterated in his Motion arguments that he had raised orally for the first time in the North Carolina Supreme Court.

It should be noted that in the case of *Ham v. State of South Carolina,* ____ U.S. _____ 35 L.Ed. 2d 46, 93 S.Ct.-(decided January 17, 1973), which is the principal case upon which the defendant relies, the questions which were not allowed to be asked of prospective jurors concerning the defendant's race involved the following:

"1. Would you fairly try this case on the basis

of the evidence and disregarding the defendant's race?

2. You have no prejudice against Negroes? Against Black people? You would not be influenced by the use of the term 'Black'?"

An examination of these questions reveals that a consideration of other evidence would not be necessary to allow the prospective juror to form the basis for his answer. These questions would require no collateral statistics or other proofs but could be answered from the prospective juror's own knowledge of himself; i.e. "Could you disregard this defendant's race?", or, "Are you prejudiced against black people?" Additionally, these questions directly involve whether the defendant could be given a fair trial on account of his race and not the collateral effect of race upon the prospective juror's decision to decide upon a death penalty for the accused. Additionally, no connection could be found in this question to the jurors' right to make the ultimate decision to convict the defendant and recommend punishment as severe as a sentence of life imprisonment. In this regard, it should be noted that the presiding judge attempted to bring repeated questions concerning race and other matters which would require additional statistics and evidence under control when he stated at page 105 of the record in the Superior Court:

"Court: I am going to sustain any further questions as it relates to staking the jury out in this case, as to what their opinion might be, as it relates to other cases." (It was directly after this statement by that Court that the defendant approached the bench and had the four questions which would require such additional evidence read into the record.)

The State would argue that the inherent danger found in permitting a defendant's counsel to go to unreasonable extremes during a jury *voir dire* to prove a prospective juror's bias was recognized by Mr. Justice Marshall in the case of *Ham v. South Carolina, (supra)* when he stated:

"I do not mean to suggest that a defendant must be permitted to propound any question or that limitless time must be devoted to preliminary *voir dire*.

> Although the defendant's interest in a jury free of prejudice is strong, there are countervailing State interests in the expeditious conduct of criminal trials and the avoidance of jury intimidation. These interests bulk larger as the possibility of uncovering prejudice becomes more attenuated."

It should further be seen that the principal authority relied upon in *Ham (supra)* was the case of *Aldridge v. United States,* 283 US 308, 315, 75 L.Ed. 1054, 51 S.Ct. 470, 73 A.L.R. 1203 (1931), wherein the defendant's attorney sought to ask a prospective juror:

> "At the last trial of this case I understand there was one woman on the jury who was a Southerner, and who said that the fact that the defendant was a Negro and the deceased a white man perhaps somewhat influenced her. I don't like to ask that question in public, but –"

The State would assert that this question could not be likened to the questions under consideration in the present case. In *Aldridge (supra),* the prospective juror was asked to reveal personal feelings within his own knowledge relating to the defendant and the case then being tried. He would not need additional statistics, proofs, or testimonies to form the basis for his answer as would be required for a response to the present inquiries.

## CONCLUSION

For the reasons set forth above, the State of North Carolina prays that the Writ of Certiorari not issue and the judgment and opinion of the Supreme Court of North Carolina remain as the law of this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Richard N. League, Assistant Attorney General with the North Carolina Department of Justice and Counsel for the State of North Carolina, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of December, 1973, I served three copies of the Brief of Respondent, State of North Carolina, in opposition to petition for writ of certiorari on Counsel representing petitioner, Junior Lee Washington as follows:

By mailing three copies thereof in a duly addressed envelope, first class postage prepaid, to Carl A. Barrington, Jr., Attorney at Law of 213 Dick Street, P. O. Drawer 749, Fayetteville, North Carolina 28302.

It is further certified that all parties required to be served, have been served.

Richard N. League

Richard N. League
Assistant Attorney General